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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1511

NELSON G. GROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 26b-43b) is reported at 375 F. Supp. 971. The opinion of the court of appeals (Pet. App. 1b-22b) is reported at 511 F.2d 910.

JURISDICTION

The judgment of the court of appeals (Pet. App. 23b) was entered February 19, 1975, and a petition

for rehearing was denied on April 2, 1975 (Pet. App. 24b). On April 10, 1975, Mr. Justice Brennan extended the time for petitioner to file a petition for a writ of certiorari to and including June 1, 1975, and the petition was filed on May 31, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in permitting the government to introduce evidence that a co-conspirator had invoked his Fifth Amendment privilege before the grand jury, in order to corroborate testimony of a prosecution witness that petitioner had stated to him that the co-conspirator would invoke the privilege.

2. Whether the offense of suborning false material testimony before a grand jury requires the corroboration of two witnesses.

3. Whether the trial court's admission of testimony relating to petitioner's financing of his 1970 senatorial campaign constituted plain error.

4. Whether the trial court abused its discretion in allowing the cross-examination of petitioner concerning his financial condition for the five years preceding trial.

5. Whether the trial court erred in its conduct of the voir dire examination of prospective jurors.

6. Whether petitioner was denied a fair trial because of alleged prosecutorial misconduct.

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of aiding and assisting the filing of a false and fraudulent tax return (26 U.S.C. 7206(2)), obstruction of justice (18 U.S.C. 1503), subornation of false declarations (18 U.S.C. 1622), and two counts of conspiracy (18 U.S.C. 371). The court sentenced petitioner to concurrent two-year prison sentences on two counts and imposed fines of $10,000 on the other three counts. The court of appeals affirmed (Pet. App. 1b-23b).

The evidence adduced at trial may be summarized as follows:

While seeking contributions to William Cahill's gubernatorial campaign in July 1969, petitioner approached William Preis, president of Stop & Save Trading Stamp Corporation, concerning a possible $25,000 cash contribution to the campaign by his company. When Preis indicated that the company would not pay that much in cash, petitioner proposed an "easy solution" whereby Preis would make a $5,000 contribution by check and petitioner would provide the company with a bill for services rendered. Petitioner stated that "since it would be passed through as an operating expense it would become tax deductible, and it would actually only cost you half as much" (Pet. App. 3b; Tr. 1911-1912).[1] Preis asked petitioner if this method of payment was legal. Petitioner assured him that if it was discovered the

[1] "Tr." references are to the transcript of trial.

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The evidence adduced at trial may be summarized as follows:

While seeking contributions to William Cahill's gubernatorial campaign in July 1969, petitioner approached William Preis, president of Stop & Save Trading Stamp Corporation, concerning a possible $25,000 cash contribution to the campaign by his company. When Preis indicated that the company would not pay that much in cash, petitioner proposed an "easy solution" whereby Preis would make a $5,000 contribution by check and petitioner would provide the company with a bill for services rendered. Petitioner stated that "since it would be passed through as an operating expense it would become tax deductible, and it would actually only cost you half as much" (Pet. App. 3b; Tr. 1911-1912).[1] Preis asked petitioner if this method of payment was legal. Petitioner assured him that if it was discovered the

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worst that could happen would be a disallowance of the deduction by the Internal Revenue Service (Pet. App. 3b; Tr. 1948-1949). Thereafter, in September 1969, Preis disguised the $5,000 contribution as a business payment on a fictitious invoice from Writers Associates. This payment was treated by Stop & Save's accounting department as an expense item (Tr. 1953-1957) and was thereafter falsely represented on the income tax return of Grand Union (Stop & Save's parent corporation) as a deductible expense (Tr. 2794).

In March 1973, as part of an investigation into political activities in Bergen County, New Jersey, a federal grand jury issued a subpoena to Stop & Save, requiring production of all of its records relating to Writers Associates. Preis confronted petitioner with the subpoena and the invoice and asked "Where do we go from here?" (Pet. App. 3b; Tr. 1993). Petitioner responded that Preis should tell the grand jury that the invoice represented payment for services rendered in connection with a demonstration against an anti-trading stamp bill which had been pending in the state legislature (Tr. 1994). When Preis asked why he should not tell the facts as they were, petitioner responded that if Preis told the truth to the grand jury "at this late stage of the game [he would] immediately be cited for conspiracy and for fraud" (Pet. App. 4b; Tr. 1999).

On April 12, 1973, Preis, accompanied by corporate counsel, met with the government prosecutors. When they questioned him about the Writers Associates in-

voice, Preis answered with the contrived story about the demonstration. The prosecutors indicated that they did not believe the story and told Preis to reconsider the whole matter and come back and tell the truth to the grand jury (Pet. App. 4b; Tr. 2001). Preis then met with petitioner and recited to him what had happened at the United States Attorney's Office. When asked by Preis if he should employ outside criminal counsel, petitioner responded (Pet. App. 4b; Tr. 2008-2009):

> You don't have any need for outside criminal counsel because I am it. * * * Perjury is one of the hardest criminal cases there is to prosecute and to prove, because * * * one of the ingredients and requirements of a perjury charge is to have someone get up and face you, challenge you, and claim that your statement was an out and out lie, and there is just nobody that can do that. * * * The only ones that really know the story behind this is [*sic*] myself and Joe McCrane. And I happen to know that Joe McCrane is going to plead the Fifth when he comes up for his hearing, and certainly I'm not going to tell, * * * so you have nothing to worry about for perjury. * * * They have no evidence of any kind. * * * You can go right back and tell that same story, and you will get off absolutely free.

Preis did "go right back and tell that same story." On April 17, 1973, he appeared before the grand jury and testified that the payment to Writers Associates was for a women's demonstration against an anti-trading stamp bill at the State Capitol in Trenton,

New Jersey. Preis was later indicted for making false declarations to a grand jury, in violation of 18 U.S.C. 1623. On advice of new counsel, he pleaded guilty to the indictment and received permission to go back to the grand jury and tell the truth about his participation with petitioner in the Cahill campaign. The indictment against petitioner followed (Pet. App. 5b; Tr. 2021-2031).

ARGUMENT

1. Petitioner argues (Pet. 8-17) that the trial court erred in allowing the government to introduce evidence of Joseph McCrane's invocation of the Fifth Amendment before the grand jury. William Preis, one of the principal prosecution witnesses, testified that he had been instructed by petitioner to tell the grand jury the previously rehearsed story that the Writers Associates' invoice represented payment for several women who were hired to demonstrate against legislation that was then pending before the state legislature (Tr. 1990-2004). Preis did so testify, and it was that testimony which served as the basis for the charge that petitioner, Preis and others conspired to obstruct justice by supplying false documents and testimony to the grand jury. Preis also testified that petitioner told him that McCrane would go before the grand jury and invoke the Fifth Amendment (Tr. 2009, 2632-2633).

As corroboration for Preis's testimony, the government introduced an excerpt of the grand jury transcript, through the testimony of the shorthand re-

porter, which showed that McCrane had in fact appeared before the grand jury and invoked the Fifth Amendment (Tr. 2855-2862).[2] The district court instructed the jury both before (Tr. 2781-2782) and after (Tr. 2863-2864) the introduction of this evidence that it was admitted solely for the limited purpose of showing that McCrane had appeared before the grand jury and had invoked the Fifth Amendment, and that it "may or may not corroborate the testimony of Mr. Preis to the effect that Mr. Gross informed him of what Mr. McCrane would do" (Tr. 2863).

McCrane's invocation of his Fifth Amendment privilege does corroborate the fact that the conversation between petitioner and Preis concerning McCrane took place, and the grand jury reporter's testimony was clearly admissible for that purpose. See *United States* v. *Hoffa*, 349 F.2d 20, 39-41 (C.A. 6), affirmed, 385 U.S. 293. The evidence was offered to prove only that McCrane appeared before the grand jury and invoked the privilege. It was not offered to prove petitioner's guilt, the existence of the conspiracy, or any other material fact in issue. Thus, the fact of McCrane's invocation of the privilege did not violate petitioner's right to confront the witnesses against him and was not inadmissible hearsay. *Dutton* v. *Evans*, 400 U.S. 74, 88 (plurality opinion).

However, even assuming *arguendo* that the evidence could be construed as an admission by a co-

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[2] Petitioner has never contested the truth of the fact that McCrane did invoke the Fifth Amendment before the grand jury.

defendant, the district court's careful instructions were more than adequate to protect petitioner from any prejudice (Tr. 2863-2864, 4879-4880). The jury was instructed that McCrane had a right to claim his constitutional privilege and that his doing so had no bearing on whether he would have incriminated himself or petitioner had he testified (Tr. 2863-2864, 4879-4880). *United States* v. *Lipowitz*, 407 F.2d 597, 600-603 (C.A. 3), certiorari denied *sub nom. Smith* v. *United States*, 395 U.S. 946; *United States* v. *Ellsworth*, 481 F.2d 864, 871 (C.A. 9), certiorari denied, 414 U.S. 1041; *United States* v. *Isaacs*, 493 F.2d 1124, 1160 (C.A. 7), certiorari denied, 417 U.S. 976.

Nothing in *Bruton* v. *United States*, 391 U.S. 123, relied upon by petitioner (Pet. 13), is to the contrary. There, the Court held that limiting instructions could not cure the prejudice to the petitioner arising from testimony describing the confession of his co-defendant at a joint trial. But the evidence of McCrane's invocation of the privilege was not "crucial" or "devastating" to petitioner, nor did it even remotely serve to incriminate him. *Bruton* is therefore inapplicable. *Dutton* v. *Evans*, *supra*, 400 U.S. at 87 (plurality opinion).[3]

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[3] Petitioner erroneously asserts (Pet. 8-17) that the government amended the indictment to add Joseph McCrane as a co-conspirator in Count III. Count III charged that petitioner and William H. Preis "did knowingly, willfully and unlawfully combine, conspire, confederate and agree with each other, *and with others*, to commit certain offenses * * *" (emphasis added). McCrane was simply one of the

Grunewald v. *United States*, 353 U.S. 391, 421-424 (Pet. 5, 13), is similarly inapposite. In that case, the Court concluded that the prosecutor could not cross-examine a defendant and elicit the fact that he claimed the privilege against self-incrimination before the grand jury in order to demonstrate the inconsistency of prior statements. In the Court's view, the defendant's invocation of the privilege before the grand jury could not be deemed to be a prior inconsistent statement. Since there was a danger that the jury might equate the Fifth Amendment plea with the guilt of the defendant, the cross-examination was ruled improper. Here, however, McCrane was not on trial in this case and did not testify at petitioner's trial.

2. Although petitioner acknowledges (Pet. 4) that the question is one "of first impression," he further argues (Pet. 17-20) that the decision below erred in holding that the charge of suborning false testimony before the grand jury did not require the corroboration of two witnesses. In petitioner's view, by its enactment of 18 U.S.C. 1623, Congress only intended to abolish the "two-witness rule" in connection with the offense of false testimony before a grand jury and not with respect to the subornation of such testimony.

As the district court (Pet. App. 5b-11b) correctly held, petitioner's contention is refuted by the leg-

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"others" with whom petitioner conspired, and petitioner was put on notice well in advance of trial that the government would proceed on that theory (Pet. App. 11b).

islative history of 18 U.S.C. 1623, which demonstrates that Congress also intended to reject the application of the two-witness rule to subornation of false testimony before a grand jury. See 18 U.S.C. 1623(e). In commenting upon the effect of the enactment, the Senate Committee stated (S. Rep. No. 91-617, 91st Cong., 1st Sess. 109 (1969):

> Title IV would add a new subsection, section 1623, to chapter 79 of title 18, United States Code, creating an additional felony provision for perjury or *subornation of perjury* before a court or grand jury. The penalty provided is a fine of not more than $10,000 or imprisonment for not more than 5 years or both. The proposal is intended to supplement, not supplant, the existing statutes dealing with perjury and subornation of perjury, 18 U.S.C. 1621, 1622, which provide for a fine of not more than $2,000 and/or imprisonment for not more than 5 years.
>
> The purpose of this title, according to Senator McClellan, is to "abolish the outmoded two-witness and direct evidence rules in perjury cases, and [to] provide for the prosecution of persons making contradictory statements under oath, without requiring proof of the falsity of one of the statements." (115 Cong. Rec. S 280.) The theory behind this apparently is that since title IV would create a new Federal crime dealing with false statements before courts or grand juries, the common law rules of evidence applicable to perjury prosecutions generally would not be applicable to it. [Emphasis supplied.]

Moreover, it is beyond question that Congress intended 18 U.S.C. 1623 to cover subornation of false

declarations before a grand jury. Although the original bill contained a specific provision for the subornation of false declarations, it was deleted from the final bill because "[t]he [Senate] committee believe[d] that this [was] adequately handled by 18 U.S.C. § 2, since the proposed provision is not intended to be an enactment of common law perjury" (S. Rep. No. 91-617, *supra*, at p. 149).[4] It is therefore clear that 18 U.S.C. 1623 created the offense of subornation of false declarations before a grand jury to which the two-witness rule was made inapplicable.[5]

3. Petitioner also argues (Pet. 20-25) that the trial court improperly allowed the government to

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[4] 18 U.S.C. 2, is the general criminal aiding and abetting provision. It states:

> *Principals.*
>
> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

[5] Count V of the indictment alleged that petitioner "did willfully, knowingly and feloniously procure and suborn William H. Preis to commit perjury, as that crime is defined in Section 1623 of Title 18, United States Code, before the United States Grand Jury * * *." The statutory reference in the margin of the indictment was to 18 U.S.C. 1622. However, even if the offense is cognizable only under 18 U.S.C. 2, any arguable error in the statutory citation in the indictment is not a ground for reversal. See Rule 7(c), Federal Rules of Criminal Procedure. See also, *Williams* v. *United States*, 168 U.S. 382, 389; *United States* v. *Hutcheson*, 312 U.S. 219; *Hammer* v. *United States*, 271 U.S. 620; *United States* v. *Nixon*, 235 U.S. 231.

cross-examine him concerning the financing of his 1970 senatorial campaign. He claims that the purpose of this evidence was to bring before the jury a crime not charged in the indictment. However, the court of appeals correctly rejected this contention, noting that petitioner made no objection to the testimony at the time it was offered and that, in any event, in light of petitioner's direct testimony, the evidence was properly admissible as a means of impeaching his credibility (Pet. App. 17b-18b). As for the prosecutor's closing remarks on this matter (Pet. App. 18b-20b), the court of appeals concluded that they appeared to go beyond merely attacking petitioner's credibility. However, petitioner failed to object at the time they were made. Since the prosecutor's statements were not so prejudicial as to constitute plain error, the court of appeals properly declined to reverse. See *United States* v. *Somers*, 496 F.2d 723, 741-742 (C.A. 3).

4. Petitioner further contends (Pet. 25-29) that the trial court erroneously allowed the government to cross-examine him concerning his income and related financial condition for the five years preceding trial. In petitioner's view, "the Court of Appeals opinion, if permitted to stand, will establish the proposition that the wealth of a defendant may be admitted on the slightest pretext despite the vast prejudice that this evidence may give" (Pet. 29).

This generalization radically distorts the circumstances under which the evidence was admitted. In this case the cross-examination was entirely appropriate to counter testimony and argument advanced

on behalf of petitioner.[6] In an attempt to establish that the three principal government witnesses, Preis, Wolfram and Striar, had testified falsely about their dealings with petitioner, petitioner repeatedly advanced the theory that those three witnesses were men of great wealth and power, who could not possibly be influenced to commit wrongful acts by one as insignificant as petitioner. This theory was introduced in petitioner's opening statement (Tr. 742, 748-749, 758), reiterated in the cross-examination of government witnesses (Tr. 831-837, 852, 1657-1658, 2284-2290), and again raised in closing argument (Tr. 4628-4632).

In order to buttress his assertion that he could not wield any influence over Preis, petitioner and two of his law partners (his father, Albert Gross, and James Demetrakis) testified that petitioner was a relatively unimportant politician, who conducted a modest law practice. Thus, for example, petitioner testified that he was hired by Preis merely to suggest ideas on how anti-trading stamp legislation could be defeated and for other minor legal matters (Tr. 3850-3853). Similarly, Albert Gross testified that the work performed by petitioner's law firm for Grand Union was closely scrutinized and controlled by Leonard Wolfram (Tr. 3487-3491). Petitioner, his father, and Demetrakis all testified that they considered Grand Union to be a "valued client" when that com-

[6] Moreover, the jury was specifically instructed not to draw any inferences from the fact that some of the witnesses, including petitioner, were men of some wealth (Tr. 4894-4895).

pany was paying the firm a yearly retainer of $4,000 (Tr. 3506, 3575, 3633, 3656, 3852-3853, 3857, 3862, 3876-3877, 4358-4362).[7]

In short, petitioner sought to create the impression that he possessed limited influence as a politician and that, as a lawyer, he was at Preis's beck and call because he needed a retainer of $6,000 from the Grand Union Company, the "valued client." It was necessary to create that impression as the prelude to his testimony that Preis threatened him with the loss of Grand Union's business because he would not substantiate Preis's story (Tr. 3973-3975). Petitioner wanted the jury to believe that the relative "power" of Preis and himself was such that Preis would never look to petitioner for advice, let alone follow it.

The district court permitted the cross-examination with respect to which petitioner complains in order to counter the thrust of petitioner's testimony, that is, to show that petitioner was on the same economic level as William Preis, that the firm's income increased greatly as petitioner gained increasing political prominence, and that a client that paid a $6,000 annual retainer was not, in terms of comparative fees, a particularly "valued" client. Under these circumstances, where petitioner put the question of his wealth before the jury, the cross-examination was

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[7] The $4,000 retainer was raised to $6,000 in July, 1969 (Tr. 3876-3877).

entirely proper and the trial court did not abuse its discretion in permitting it. See *United States* v. *DeSapio*, 435 F.2d 272, 284 (C.A. 2), certiorari denied, 402 U.S. 999; *United States* v. *Lowe*, 234 F.2d 919, 921-922 (C.A. 3), certiorari denied, 352 U.S. 838; *Michelson* v. *United States*, 335 U.S. 469, 485. See also *United States* v. *Torbert*, 496 F.2d 154, 158 (C.A. 9), certiorari denied, 419 U.S. 857; *Mullins* v. *United States*, 487 F.2d 581, 584-585 (C.A. 8); *United States* v. *Hykel*, 461 F.2d 721, 728 (C.A. 3).

5. Petitioner also argues (Pet. 29-32) that the panel of prospective jurors should have been questioned concerning the possible impact on his case of the publicity given to the Watergate affair. But this case was in no way connected with Watergate (Tr. 53). At all events, the trial court, albeit without specific reference to Watergate, asked the prospective jurors the kind of questions sought by petitioner. The two and one-half days of jury selection is covered by the first 651 pages of the transcript in this case. The panel was questioned as a whole, and each prospective juror was questioned individually. At petitioner's request, the trial court went further and examined each prospective juror privately in chambers (Tr. 32, 156, 401). In addition to the standard questions concerning employment, family and possible problems caused by sequestration, the court questioned each juror concerning his possible exposure to pretrial publicity, to determine whether, with an open mind, the juror would give both petitioner and the

government a fair trial by relying only on the evidence adduced at trial in arriving at a verdict.[8]

Thus, the trial court's failure to question the prospective jurors about the Watergate affair did not deprive petitioner of a fair trial. Its voir dire examination elicited from the members of the jury panel the very responses sought by petitioner's counsel (Tr. 286, 308-309). Indeed, six prospective jurors indicated a possible bias and were excused for cause.[9] Those prospective jurors who indicated a possibility of bias were identified and excused. And counsel for both the defense and the prosecution were given enough information to enable them intelligently to exercise their peremptory challenges as to the remaining veniremen. The process of jury selection was therefore eminently fair.

6. Finally, petitioner broadly attacks (Pet. 33-38) the conduct of the prosecutors in characterizing his testimony as "lies," demeaning his defense, and

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[8] During the discussions between counsel and the court on petitioner's request for questions concerning Watergate, petitioner's counsel stated, "[m]ay I say that I think that that interrogation with respect to his [a prospective juror's] feelings of prejudice and bias towards politicians I think go far toward what I am looking for" (Tr. 60). Later, counsel said that "[p]erhaps they should be asked whether they have any preconceived ideas with respect to political campaign financing" (Tr. 82). In response to these and other requests made by petitioner's counsel, the trial court examined each juror about his and his family's involvement in political activity, and about their opinions of politicians and other persons involved in that activity (Tr. 293, 304, 318, 319, 324, 335-336, 347-348, 353, 454-455, 464, 469, 474-476, 490, 495-496, and 513). In addition, the trial court also questioned the jurors

allegedly denying him access to exculpatory material. Thus, for example, petitioner isolates one remark by the prosecutor (Pet. 33-34), to which he made no objection, and asserts that it warranted the granting of a new trial. However, when the prosecutor's remark, made during closing argument, is viewed in context and compared with petitioner's closing argument, it becomes apparent that the impact of the prosecutor's remark, which characterized one piece of petitioner's testimony as "an outrageous lie," was more than neutralized by the remarks of defense counsel. On at least 29 occasions defense counsel referred to government witnesses as liars;[10] his closing

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about their attitude towards political contributions and persons involved in either soliciting, making or receiving such contributions (Tr. 296, 304, 318, 335, 347, 354, 449, 470, 476, 490, 497 and 508).

[9] Several other prospective jurors were excused when they indicated they had read about the case in the press.

[10] For example, defense counsel stated:

> "* * * what I firmly believe was the case, that he [Wolfram] knew that Preis was going to lie * * *." (Tr. 4540);
>
> "* * * Preis is a liar, and that's what he is right now * * *." (Tr. 4554);
>
> "* * * if Mr. Goldstein [the prosecutor] had any other concrete evidence of the phony-baloney charges in this indictment he'd concentrate on that evidence.
>
> "But because he has got to rely for proof to you of that indictment on a lying perjurer by the name of William Preis, who is caught in a maze of lies going back to 1966 and an equally culpable liar by the name of Leonard Wolfram, who in a few moments I will demonstrate to

argument was laced throughout with personal opinion on at least 16 other occasions;[11] and he made what can only be considered as a personal attack on the United States Attorney and the methods employed in bringing this case to trial (Tr. 4606, 4630-4632, 4657-4658, 4693-4695).

Of course, the injection of personal opinion in a case by either the prosecutor or defense counsel is improper. The fact is that this was a hard fought trial by both the prosecution and the defense, and the outcome reflected the jury's evaluation of the witnesses' credibility. Since petitioner's counsel made no objection to the prosecutor's remark and requested no curative instruction, the remark standing alone does not rise to the level of plain error. *Harris* v. *United States*, 402 F.2d 656, 657-659 (C.A.D.C.); *United States* v. *Cook*, 505 F.2d 659, 663-664 (C.A.

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you has flagrantly lied to you in outrageous fashion * * *." (Tr. 4621);

"It is a damnable lie told by Mr. Wolfman * * *." (Tr. 4658);

"And Leonard Wolfram told you the most damnable lie of all * * *." (Tr. 4659);

"Let me move very quickly, to what I consider to be another fatal error on the part of the liars, Preis and Wolfram. * * *" (Tr. 4670);

"He [Preis] has been caught in so many lies and so many inconsistencies that I don't think you will have much patience with him * * *." (Tr. 4696).

See also Tr. 4531, 4539, 4559, 4580, 4588, 4599, 4600, 4602, 4606, 4650-4654, 4657-4658, 4660-4661, 4675, 4677, 4680, 4686, 4693-4695.

[11] See Tr. 4537, 4550, 4578, 4584-4585, 4592, 4595, 4598, 4600, 4602, 4606, 4615, 4624, 4629, 4638.

5), certiorari denied, June 2, 1975 (No. 74-1145). See also *United States* v. *Miriani*, 422 F.2d 150, 153 (C.A. 6), certiorari denied, 399 U.S. 910.

The remainder of petitioner's argument alleging prosecutorial misconduct was carefully considered and rejected by both courts below (Pet. App. 21b, 36b-40b). As the district court stated, "I have carefully reviewed the records in this case and I have concluded that there was no prosecutorial misconduct" (Pet. App. 36b).[12] The court of appeals likewise observed that "As to further allegations of prosecutorial misconduct, we accept the exhaustive analysis of Judge Whipple in his opinion denying a new trial" (Pet. App. 21b).[13]

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[12] The trial court further pointed out that "[t]he defendant uses the phrase 'prosecutorial misconduct' as a catchword to reargue the admissibility of certain evidence and the scope of cross-examination of defense witnesses" (Pet. App. 37b).

[13] Petitioner's contentions (Pet. 36-38) concerning allegedly exculpatory evidence brought to light during the testimony of McCrane at a subsequent trial were first made to the court of appeals in a petition for rehearing. In denying the petition, the court correctly stated (Pet. 24b):

> Points 2, 9 and 10 of Appellant's petition for rehearing (concerning the availability of McCrane and new evidence revealed at his two trials) are more properly matters to be brought to the attention of the trial court in a motion under F. R. Cr. P. 33.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

MEYER ROTHWACKS,
CHARLES E. BROOKHART,
Attorneys.

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